Supreme Court, U.S.
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No. 08-459

In The

Supreme Court of the United States

RICHARD MROCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Seventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The federal government charged Richard Mroch, along with 16 alleged co-actors, as a participant in RICO offenses and criminal conspiracies in the Eastern District of Wisconsin. Prior to trial, the government offered to settle its case against Mroch in a manner which contemplated a sentencing guidelines range of 70 to 87 months. On the advice of counsel, Mroch rejected the plea offer and proceeded to trial, after which he was convicted of all the charged offenses. At sentencing, the district court imposed a total sentence of 288 months. On appeal, the Seventh Circuit affirmed Mroch's conviction and sentence, finding the evidence of his guilt "overwhelming."

In a *pro se* federal habeas petition, Mroch asserted his trial counsel was ineffective during the plea negotiation stage in failing to reasonably convey and explain the guidelines implications of the government's plea offer, versus a sentencing following guilty verdicts at trial, and in advising Mroch he could successfully defend against the charges at trial. In sworn documents, Mroch asserted he would have accepted the government's plea offer had trial counsel adequately explained the offer; explained the relationship between federal conspiracy law and the relevant conduct provisions of the sentencing guidelines; and calculated the likely sentence Mroch faced, if convicted at trial.

QUESTIONS PRESENTED – Continued

The district court denied Mroch's ineffective assistance claim without an evidentiary hearing, finding his counsel performed reasonably by conveying the general terms of the government's plea offer and advising Mroch to reject that offer, based upon counsel's belief he could obtain an acquittal at trial. Additionally, the district court found Mroch had not presented sufficient objective evidence that he would have accepted the government's plea offer had his counsel performed reasonably.

In a two-page summary order, the Seventh Circuit adopted the district court's reasoning in affirming its dismissal of Mroch's ineffective assistance of counsel claim. In so doing, the Seventh Circuit additionally "observed" that Mroch could not establish ineffective assistance of counsel at the pre-trial plea negotiation stage without also establishing counsel was ineffective as an advocate at trial.

1. In finding Mroch could not, as a matter of law, establish his trial counsel was ineffective at the critical pre-trial plea negotiation stage of the proceedings without also establishing his counsel was ineffective as an advocate at trial, does the Seventh Circuit's decision conflict with this Court's jurisprudence developed in *Powell v. Alabama*, *Strickland v. Washington*, *Hill v. Lockhart* and *Murray v. Carrier*, and the decisions of other federal courts of appeals which have addressed this specific issue?

QUESTIONS PRESENTED – Continued

2. In finding Mroch's counsel performed reasonably by merely conveying the general terms of the government's plea offer, is the Seventh Circuit's decision in conflict with other federal courts of appeals which require reasonably competent counsel to fully and adequately explain the difference between the guidelines sentences the defendant likely faces in accepting the offer *versus* sentencing after a conviction at trial?

3. In finding Mroch's sworn statements were insufficient "objective evidence" that Mroch would have accepted the government's plea offer had counsel performed reasonably, is the Seventh Circuit's decision in conflict with other federal courts of appeals which have also considered the difference between the sentence offered and the sentence imposed after trial in assessing the *Strickland* prejudice prong?

4. In finding Mroch's concern for accepting a plea offer requiring his admission to more cocaine than he "honestly" possessed was a claim of innocence and precluded him, as a matter of law, from establishing he was prejudiced by counsel's unreasonable performance, is the Seventh Circuit's decision in conflict with other federal courts of appeals which have determined a claim of innocence is merely a factor to consider in assessing the *Strickland* prejudice prong?

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OPINION BELOW

Richard Mroch filed a Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody, pursuant to Title 28 U.S.C. §2255. *Mroch v. U.S.*, E.D. Wis. Case No. 04-C-70. The district court denied Mroch's petition, without an evidentiary hearing, in an unpublished decision and order, which appears at Appendix 4-14.

The Seventh Circuit Court of Appeals affirmed the district court's decision in an unpublished summary order, which appears at Appendix 1-3.

JURISDICTION

On May 8, 2008, the Seventh Circuit Court of Appeals filed its summary order affirming the district court's order denying Mroch's habeas petition. On July 7, 2008, the Seventh Circuit denied petitioner's request for a re-hearing and re-hearing *en banc*. The Seventh Circuit issued its mandate on July 15, 2008.

This Court has jurisdiction to review the Seventh Circuit Court of Appeals' orders, pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE AND FACTS

On May 30, 1997, a grand jury sitting in the Eastern District of Wisconsin issued an Indictment charging Richard Mroch [Mroch] and 16 alleged co-conspirators, with Racketeer Influenced and Corrupt Organizations [RICO] offenses, RICO conspiracy offenses and drug conspiracy offenses in *U.S. v. O'Neill, et al.*, E.D. Wis. Case No. 97-CR-98. Mroch was charged in three counts involving RICO, a RICO conspiracy and a drug conspiracy, in violation of 18 U.S.C. §§2 and 1962(c) and (d); 21 U.S.C. §§841(a)(1) and 846 (R. 14, p. 2).[1]

More specifically, the government alleged Mroch participated in the RICO, RICO conspiracy and drug conspiracy offenses with his 16 charged co-conspirators, all of whom it was alleged were members of the Outlaws motorcycle gang. The government alleged Mroch and his fellow gang members undertook violent actions, including murderous force, against members of the Hell's Angels motorcycle gang in order to exercise control over criminal activities, such as drug sales. The "warfare" the Outlaws waged against their rivals resulted in the murder of an elderly couple (who had no apparent connection to either of the rival gangs) and caused injuries to police

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[1] Unless otherwise noted in this petition, Mroch will cite to those documents in the habeas record – rather than the record before the courts on direct appeal in *U.S. v. Warneke*, 310 F.3d 542 (7th Cir. 2002) – which provide the underlying procedural history and facts necessary for a consideration of his petition.

officers who were attempting to dismantle a bomb planted by Mroch's co-conspirators in furtherance of the gang's interests. Mroch, while charged with participating in the gang's illicit drug activities, was not personally implicated in either of those two murderous and violent acts. *See U.S. v. Warneke*, 310 F.3d 542 (7th Cir. 2002).

Mroch pleaded not guilty to each of the charges (R. 14, p. 2).[2] Prior to trial, he sought severance from his co-conspirators and cited concerns about (a) the disparity of evidence against the various members of the conspiracy, most especially the evidence relating to two co-conspirators' participation in the above-mentioned murder in which Mroch was not implicated; (b) prejudicial spillover of evidence not relevant to Mroch's charged offenses that would be admitted at a joint trial; (c) the jurors' inability to compartmentalize evidence against only Mroch and only his charged offenses following an anticipated lengthy trial; (d) the introduction of statements made by co-conspirators, which would implicate Mroch, but about which Mroch would be unable to confront his accusers; (e) the complexity of the joint trial; and (f) the likelihood that Mroch would suffer from a loss of individual identity from the mass of other co-conspirators (*Id.*).

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[2] On November 11, 1998, another grand jury filed a superseding Indictment charging essentially the same offenses against Mroch and to which he continued his pleas of not guilty (*Id.*, p. 3).

After reviewing Mroch's and his co-conspirators' motions for severance, the magistrate judge assigned to handle pre-trial motions ordered severance into groups of not more than five or six defendants (*Id.*, p. 3). The government proposed two trial groups of eight or nine defendants in one group and seven in the other (*Id.*). While the district court declined to adopt any severance plan, it did share the magistrate judge's concern about a "potential mega-trial." (*Id.*).

Before the district court finally ruled on Mroch's and his co-conspirators' severance motions, the government made an offer to settle the matter in a letter written and sent to Mroch's trial counsel, Michael Barth [Barth]. In this letter, the government discussed at length the evidence it had and believed was admissible against Mroch at trial. It estimated that, should Mroch proceed to trial and lose, he would likely face a life sentence (absent any adjustments for role in the offense, relevant conduct or acceptance of responsibility) or, should the district court grant a downward adjustment for his role in the offense, a sentencing guidelines range of 324 to 405 months. To settle the matter short of trial, the government made an offer requiring Mroch to admit to one count of racketeering, with a robbery as the underlying crime, and one count of conspiracy to distribute 400 to 500 grams of cocaine. This offer anticipated a sentencing guidelines range of 70 to 87 months. The government's offer was not predicated upon Mroch testifying against any of his co-conspirators at trial and remained open unless and until the district court cut off

the possibility of plea negotiations (R. 2, Attachment 1).

After the government made its proposed plea offer, the district court conducted a final pre-trial conference with the remaining parties and their counsel. At this hearing, the district court ruled it would not sever the cases against the remaining co-conspirators and they would proceed to trial jointly (R. 14, p. 4). The government's offer to settle remained open following the district court's ruling on severance and up until trial[3] (*Id.*).

Mroch went to trial with eight of his co-conspirators. During the trial, which lasted approximately 2½ months, the government introduced evidence against Mroch's co-conspirators about their involvement in the violent gang warfare, murder and bombing which so concerned Mroch pre-trial that he moved to sever his case from those co-conspirators for trial. In examining the quality and quantity of this and the government's other evidence against Mroch at that lengthy trial, the Seventh Circuit Court of Appeals found that evidence was "overwhelming" in establishing Mroch's guilt. *See Warneke*, at 545. Thus, it was not surprising when, on June 15, 2000, Mroch's jury returned guilty verdicts on all three of his

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[3] Arguably, the offer remained open during trial, as one of Mroch's co-conspirators, James Roston, pleaded guilty to one count of racketeering activity, for which he received a sentence of 36 months imprisonment, near the end of trial (R. 14, p. 4, n. 2).

charged offenses, which the district court accepted and upon which it adjudged Mroch guilty (R. 14, p. 4).

On October 12, 2000, the district court sentenced Mroch to serve 240 months imprisonment on Counts 1 and 2, to be served concurrently with one another, and 48 months imprisonment on Count 3, to be served consecutively to the term imposed on Counts 1 and 2 (*Id.*). While the district court did not sentence Mroch to either life imprisonment or within the sentencing guidelines range of 324 to 405 months earlier predicted by the government pre-trial, it did impose a sentence more than three times the amount of imprisonment the government was willing to recommend as part of its pre-trial offer.

Mroch appealed his conviction and sentence to the Seventh Circuit Court of Appeals, which quickly dispatched his and his co-conspirators' arguments regarding the sufficiency of the evidence to support their convictions, finding "the evidence against [Mroch was] overwhelming." *Warneke*, at 545. In a one-sentence ruling, that court also found the district court did not abuse its discretion in denying Mroch's motion to sever his case from his co-conspirators for trial. (*Id.*). Ultimately, the Seventh Circuit Court of Appeals affirmed Mroch's conviction and sentence on November 12, 2002, in *U.S. v. Warneke*, 310 F.3d 542 (7th Cir. 2002).

Following the return of that mandate on December 6, 2002, Mroch filed a Petition for a Writ of Certiorari with this Court. The Seventh Circuit Court of

Appeals filed this Court's order denying that petition on May 23, 2003 (*Id.*, p. 5).

Mroch then filed a *pro se* 28 U.S.C. §2255 Petition to Vacate, Set Aside or Correct His Federal Sentence with the district court on May 17, 2004, to which he attached a memorandum of law, affidavits and exhibits. He requested the district court conduct an evidentiary hearing in support of his petition. As the ground for relief, Mroch claimed his "trial counsel's failure to discuss the impact of all the guideline enhancements he was subject to should he not accept the government's plea offer, and his [counsel's] advice to reject the offer and proceed to trial, based on his belief that his client was innocent, violated Mroch's right to effective assistance of counsel" (R. 2, p. 5).

In the memorandum of law and affidavit Mroch offered in support of his *pro se* §2255 petition, Mroch asserted the following:

> 1. Barth conveyed the government's plea offer to Mroch during a five-minute telephone conversation.[4] During this conversation, counsel told him the government made an offer to settle the case short of trial. Mroch's understanding of the offer was, in exchange for his admission he

[4] Mroch was in custody from the time of his arrest and through the end of trial. Thus, Mroch was in a custodial setting, rather than his attorney's office, during the five-minute telephone conversation during which his counsel conveyed the government's plea offer.

committed an assault with a deadly weapon and possessed in excess of 200 grams of cocaine, the government would recommend a 6½-year sentence.

2. Barth never discussed the possible guidelines enhancements Mroch faced should he proceed to trial and be found guilty. Counsel never provided him with a copy of the government's offer letter and, thus, he was not aware of the position the government might take at sentencing should he proceed to trial and lose. He was not aware he faced a possible guidelines, rather than statutory maximum, sentence of life imprisonment, if convicted of all the charged offenses.

3. Barth did not explain that Mroch was subject to possible consecutive sentences, if convicted of all the charged offenses at trial.

4. Mroch rejected the government's plea offer based upon Barth's claim that he (Barth) should have "no problem" in obtaining an acquittal for Mroch on the charged offenses, due to the government's "lack of evidence" and Barth's stated belief that Mroch was "innocent of the charges filed" and should proceed to trial.

5. Mroch initially believed he would not be proceeding to trial with all of his charged co-conspirators who did not resolve their

cases with a plea and rejected the plea offer prior to the district court's order denying severance. Following the district court ruling against Mroch on the issue of severance, Barth did not discuss the possible additional prejudice he would face at a joint trial. Thus, in rejecting the government's plea offer, he did not understand he would be facing a trial at which all of the potentially prejudicial spillover evidence and highly incriminating co-conspirator statements would be admitted against him.

6. Barth suggested they would "lie in the weeds" and allow the co-conspirators' attorneys to attack the credibility of the government witnesses so that Mroch could later argue he was not guilty because his charges were less serious than his co-conspirators'.

7. Part of Mroch's reluctance in accepting the government's plea offer was his concern for admitting to possessing more cocaine than he had "involvement with." Nonetheless, ***he "would have, without reservation, accepted the government's offer" had he known his "chances of succeeding at trial were slim to none."***

(R. 2, pp. 10-14 and Attachment 2) (emphasis added).

In addition to his own affidavit, Mroch submitted two affidavits signed and sworn to by his mother,

Carol Mroch, and friend, Charles Lahey, in support of his §2255 petition. These affidavits established:

1. Mroch was aware of the government's offer to settle the matter short of trial, which was likely to result in a sentence of 6 or 6½ years.

2. Mroch rejected the plea offer on the advice of counsel, who informed both Ms. Mroch and Mr. Lahey that he believed in his client's innocence and believed his client would be acquitted following a jury trial.

3. Mroch also rejected the plea offer because he thought the government was trying to trick him by requiring him to admit to the possession of more cocaine than he "honestly" possessed.

(*Id.*, Attachments 4 and 5).

Finally, Mroch offered the signed and sworn affidavit of Barth in support of his petition. In that affidavit, Barth claimed:

1. He received a written plea offer from the government prior to trial and that plea offer involved Mroch entering guilty pleas to violations of 18 U.S.C. §1959(a)(3) and 21 U.S.C. §841(a)(1) in exchange for the government's agreement, among other things, to seek a sentence within the guidelines range of 70 to 87 months. He conceded he could not recall whether he ever shared with or

forwarded a written copy of the government's written plea offer (letter) to Mroch.

2. He did convey the specific offer to Mroch during a telephone conversation. He conceded he did not recall whether he ever advised Mroch of the potential guidelines enhancements referred to in the government's written plea offer should Mroch reject the offer.

3. He shared with Mroch his concern that the "spillover" evidence offered against his co-conspirators at a joint trial might negatively impact Mroch's jury.

4. He assured Mroch that, based upon his past experience and investigation of the government's evidence, he could successfully defend Mroch at trial.

5. He always tried to communicate to Mroch his belief in him, their defense and Barth's ability to successfully put forward that defense.

(*Id.*, Attachment 6).

Following its receipt of Mroch's §2255 petition and supporting memorandum, with attachments, the district court ordered the government to respond to Mroch's petition (R. 4).

In its response, the government claimed Barth's performance was neither deficient nor prejudicial to Mroch.

In arguing Barth performed reasonably in conveying the plea offer and advising Mroch to reject it, the government focused on Mroch's apparent knowledge of the general nature of the charges to which Mroch would be required to plead guilty and the general guidelines range the government would recommend in exchange for those pleas.[5] Additionally, the government argued that, because Barth believed he could mount a successful defense on Mroch's behalf, his advice to Mroch to reject the plea offer was reasonable. The government bolstered this argument with what it characterized as "Mroch's claim of innocence" regarding his concern that the plea offer would require him to admit responsibility for more cocaine than he "honestly" possessed (R. 5, pp. 4-5).

In arguing Mroch was not prejudiced by trial counsel's performance, the government claimed Mroch did not satisfy *Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991), which requires a defendant establish through "objective evidence that there is a probability that, but for counsel's advice, he would

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[5] Based upon his admissions and those of his mother and friend in the affidavits offered in support of the petition, Mroch did not deny his counsel conveyed the general nature of plea offer to him. He did, however, assert the information Barth provided was incomplete and inaccurate regarding the exact charges to which the government would require his admissions of guilt and the sentencing guidelines range he would face if he accepted the government's offer. He asserted more was required of Barth – namely, conveying the great and real risk at sentencing should he proceed to trial and lose.

have accepted the plea." The government argued Mroch's affidavit and those he offered in support of his petition were "no more than . . . self-serving statement[s] made in hindsight" (R. 5, pp. 5-6). The government, once again, referred to Mroch's stated concerns to one of the affiant's about admitting to more cocaine than he "honestly" possessed and argued this established Mroch would not have accepted the plea offer no matter what advice trial counsel gave him (*Id.*, p. 6).

In his reply to the government's response, Mroch noted that none of the record evidence submitted to the district court established Barth ever discussed anything more than the general nature of the charges to which the government would require him to plead guilty or the anticipated and general sentencing guidelines range the government would recommend (R. 6, p. 1). Most importantly, he noted Barth never outlined the different sentencing outcomes – either in guidelines ranges or the sentence structure of "concurrent" versus "consecutive" – he would likely face should he proceed to trial, versus accept the government's plea offer (*Id.*, Declaration p. 2).

Additionally, he noted neither the affidavits he submitted in support of his petition nor anything submitted by the government established Barth ever "accurately" conveyed the nature of the charges presented as part of the plea offer or the likely sentence he faced should he accept that offer – namely, that the offer required he admit to possessing 400 to 500 grams (rather than 200) of cocaine and the

government would recommend a sentence within the guidelines range of 5 years and 10 months to 7 years and 3 months (rather than 6½ years) (*Id.*, pp. 1-2; Declaration of Mroch, attached to Reply).

Mroch asserted Barth never explained the concept of relevant conduct and how it was interconnected with federal conspiracy law and the sentencing guidelines, which allow for an individual defendant to be held accountable and sentenced for criminal acts committed by co-conspirators, even when that individual defendant may not have actually and directly participated in committing the offense (*Id.*, Declaration, p. 2). Thus, he did not understand he could be held accountable and sentenced for cocaine possessed or distributed by his co-conspirators, even though he did not "honestly" possess or distribute that cocaine, and would have been willing to admit to the amount attributed to him by the government in its plea offer had he understood the impact of conspiracy laws and the relevant conduct provisions of the sentencing guidelines on his ultimate sentence.

Finally, he declared he never was privy to the written plea offer and its explanation of the government's relative positions regarding his sentence should he accept the government's plea offer, versus proceed to trial; and that, had he been aware of the great disparity between the relative sentences he faced in accepting the plea offer versus following guilty jury verdicts, he would have accepted the plea offer (*Id.*, Declaration p. 2).

Following Mroch's reply, the district court ordered Barth to prepare and submit an affidavit "detailing all relevant discussions he had with counsel for the government and Mroch concerning disposition of Mroch's case short of trial, including any plea offered by the government together with ***an assessment of relevant sentencing guidelines depending on whether Mroch proceeded to trial.***"[6] (R. 7, p. 1) (emphasis added).

In response to this order, Barth submitted a second affidavit regarding his representation of Mroch (R. 12). While Barth did aver he had discussions with Mroch about plea negotiations (*Id.*, p. 1), he did not address or claim any of the following:

1. When and on how many occasions he discussed the offer with Mroch.

2. What he specifically conveyed to Mroch regarding the government's written plea offer (i.e., the exact nature of the ch rges to which Mroch would be required to admit and the specific sentencing guidelines range the government would recommend).

3. Whether he ever provided a copy of that written plea offer, which included the

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[6] In ordering Barth to submit the affidavit, the district court did not reference the earlier affidavit Barth prepared and Mroch submitted with and in support of his original petition. The court's decision, order and judgment denying Mroch's §2255 petition made no specific reference to either affidavit.

government's relative positions regarding sentencing should Mroch accept the offer versus proceed to trial, to Mroch as part of those discussions.

4. Whether he ever outlined the government's relative sentencing positions orally during his discussions with Mroch.

5. Whether he discussed the concept of co-conspirator liability and its interaction with the relevant conduct provisions of the sentencing guidelines with Mroch and how Mroch could be held accountable at sentencing for cocaine possessed or distributed by his co-conspirators.

6. Whether he ever discussed the sentencing statutes and guidelines and their application to Mroch's situation or how those statutes and guidelines would likely be applied differently should Mroch accept the government's plea offer, versus proceed to trial.

7. Whether he ever discussed the plea offer in the context of the negative implications for Mroch after the district court ruled against Mroch's request for severance from his co-conspirators for trial.

Essentially, Barth did not or was unable to respond to the district court's order that he outline what he discussed with Mroch regarding an assessment of relevant sentencing guidelines depending on whether Mroch accepted the government's plea offer

versus proceed to trial. In attempting to respond to the court's distinct order, Barth merely asserted a list of his usual customs regarding his "plea practice" over the years (*Id.*, pp. 1-2).

Despite Barth's failure to comply with the court's order that he submit an affidavit "detailing all relevant discussions he had with counsel for the government and Mroch concerning disposition of Mroch's case short of trial, including any plea offered by the government together with ***an assessment of relevant sentencing guidelines depending on whether Mroch proceeded to trial***," the district court denied Mroch's §2255 petition without the benefit of either Barth's written answers or an evidentiary hearing at which Barth would be asked to address the court's specific questions about the nature of his communications with the government and Mroch during the pre-trial plea negotiation process.

Though reaching its decision without the benefit of answers to the above-outlined questions, the district court acknowledged Mroch was constitutionally entitled to the effective assistance of counsel during the plea process. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (R. 10, p. 3; App. 7).

In reviewing Mroch's §2255 claim, the district court applied the test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, the court found Mroch had to establish his counsel's representation fell below an objective standard of reasonableness and that he was prejudiced because

"there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.*; App. 7) (*citing Strickland*, at 695). The court also applied the test established in *Toro v. Fairman*, 940 F.2d 1065 (7th Cir. 1991), in assessing *Strickland*'s prejudice prong and found Mroch "must establish through objective evidence that there is a reasonable probability that, but for counsel's advice, he would have accepted the plea offer." (*Id.*, pp. 3-4; App. 7) (*citing Toro*, at 1068).

In finding Barth's representation was objectively reasonable, the district court focused on Mroch's apparent knowledge of the general terms of the government's plea offer, the general nature of the charges to which he was expected to plead guilty and a general estimated sentence he would serve as part of that offer (*Id.*, pp. 4-5; App. 8-9).[7] The court held that "[s]o long as Barth communicated the essential terms of the agreement to Mroch, he has satisfied the Sixth Amendment right to counsel standard in the context of plea negotiations." (*Id.*, p. 5; App. 8).

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[7] Mroch's understanding of the contemplated charges to which he would plead and the sentence he would likely face, should he accept the government's plea offer, was inaccurate. Mroch claimed, and Barth did not dispute, that any such inaccuracy in Mroch's understanding was the product of Barth's failure to afford any time or effort in conveying the offer to Mroch.

The court credited Mroch's claim that he rejected the plea offer by the government on the advice of counsel. However, the court found that advice was reasonable because Barth claimed, based upon his prior trial experience and review of the evidence in Mroch's case, he could defend his client and secure an acquittal (*Id.*, pp. 5-6; App. 10).

The court then went on to assess the application of *Strickland*'s prejudice prong to Mroch's case and determined Mroch did not set forth objective evidence establishing he would have accepted the plea offer but for Barth's advice (*Id.*, p. 7; App. 10-12).

In making that determination, the court found Mroch's statements – in his petition, affidavits and declarations – that he would have accepted the plea offer if properly and fully advised by counsel regarding the risks of proceeding to trial and the significant disparity between the possible sentences he faced following a trial versus a plea, were merely self-serving (*Id.*; App. 11).

The court focused on language in the Lahey affidavit – that Mroch rejected the plea offer because he could not "honestly" admit he possessed the amount of cocaine the government required – to support its finding that Mroch's claim he would have accepted the plea offer, if properly advised by counsel, was merely self-serving (*Id.*; App. 10-11). The court also relied on Ms. Mroch's sworn statements – that she advised her son, Mroch, to accept the government's plea offer, but he rejected it upon the advice

of counsel – to find Mroch would not have accepted the plea offer (*Id.*, pp. 7-8; App. 11).

In denying Mroch's §2255 petition claiming ineffective assistance of counsel without holding an evidentiary hearing, *citing Dagan v. U.S.*, 18 F.3d 460, 464 (7th Cir. 1994), the court found that, "on the face of the record," Mroch was "not entitled to any relief because he has not satisfied either prong of the *Strickland* test to demonstrate ineffective assistance of counsel" (R. 10, p. 9; App. 13).

Following the district court's denial of relief, Mroch filed his Notice of Appeal on August 24, 2007 (R. 16).

He subsequently filed a Petition for Issuance of a Certificate of Appealability with the district court on August 27, 2007, requesting permission to present the following claim to the Seventh Circuit Court of Appeals:

> Could reasonable jurists debate whether Mroch's trial counsel was ineffective in failing to reasonably convey and explain the guidelines implications of the government's plea offer, which significantly reduced his possible sentencing exposure, when his rejection of that offer produced a far-lengthier guidelines sentence following his conviction at a "mega-trial" with eight of his charged co-conspirators?

(R. 14).

The district court granted Mroch's request to present the above-outlined issue to the Seventh Circuit Court of Appeals in an order dated November 9, 2007 (R. 19; App. 18-21).

In a two-paragraph summary order, dated May 8, 2008, a three-judge panel of the Seventh Circuit Court of Appeals affirmed the district court's decision and judgment denying Mroch's petition for relief. In so doing, the panel relied solely on the district court's "comprehensive opinion" with the "additional observation" that:

> Whether counsel furnished ineffective assistance depends on the overall course of representation; it is inappropriate to single out one aspect of a lawyer's work while ignoring the rest. Mroch's lawyer worked hard to produce an outright acquittal, and his new lawyer does not fault his old lawyer's performance as an advocate. It is inappropriate to divorce the advice to go to trial from an analysis of what could be (and indeed was) done *at* trial on a client's behalf. *See* also, e.g. *Almonacid v. United States*, 476 F.3d 518 (7th Cir. 2007); *Toro v. Fairman*, 940 F.2d 1065 (7th Cir. 1991).

(7th Circuit Order, dated May 8, 2008, App. 1-3).

Mroch filed a request for a re-hearing and re-hearing *en banc* with the appellate court on June 23, 2008, in which he argued the panel decision conflicted with this Court's decision in *Murray v. Carrier*, 477 U.S. 478, 496 (1986), that "the right to effective

assistance of counsel . . . may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." (*citing U.S. v. Cronic*, 466 U.S. 648, 657, n. 20 (1984) and *Strickland v. Washington*, 466 U.S. 668, 693-96 (1984)).

Additionally, he argued the panel decision also conflicted with Seventh Circuit Court of Appeals' decisions that effective counsel must (1) accurately convey any plea offers; (2) make an estimate of the likely sentences the client faces should the client accept the plea offer, rather than proceed to trial and lose – especially, when there is a large disparity between those possible sentences; (3) and clearly communicate those estimates to the client. He noted that the Seventh Circuit's decisions had never held those responsibilities were met simply because counsel acted as an effective, but unsuccessful, advocate at trial. *Almonacid v. U.S.*, 476 F.3d 518, 521-23 (7th Cir. 2007); *Bethel v. U.S.*, 458 U.S. 711, 717 (7th Cir. 2006); *Moore v. Bryant*, 348 F.3d 238, 241 (7th Cir. 2003); *U.S. v. Barnes*, 83 F.3d 934, 939 (7th Cir. 1996) and *U.S. v. Golden*, 102 F.3d 936, 943 (7th Cir. 1996).

Mroch sought, therefore, *en banc* consideration of the panel's summary order, with its notable "observation," arguing it was necessary to secure or maintain uniformity with this Court's and the circuit's decisions, Fed. R. App. P. 35(a)(1) and (b)(1)(A), and because the question presented by the panel's observation – a federal habeas petitioner cannot, as a matter of law, establish his trial counsel was ineffective for

failing to reasonably and properly advise him regarding the government's proposed plea agreement, unless petitioner can also establish trial counsel performed unreasonably as an advocate at trial – involved a question of exceptional importance because the panel's decision conflicted with this Court's, its own and other United States Courts of Appeals' authoritative decisions that have addressed the issue. Fed. R. App. P. 35(a)(2) and (b)(1)(B).

Mroch's petition for a re-hearing and re-hearing *en banc* was denied in an order dated July 7, 2008 (7th Circuit Order dated July 7, 2008; App. 22).

REASONS FOR GRANTING THE PETITION

I. IN FINDING MROCH COULD NOT, AS A MATTER OF LAW, ESTABLISH HIS TRIAL COUNSEL WAS INEFFECTIVE AT THE CRITICAL PRE-TRIAL PLEA NEGOTIATION STAGE OF THE PROCEEDINGS WITHOUT ALSO ESTABLISHING HIS COUNSEL WAS INEFFECTIVE AS AN ADVOCATE AT TRIAL, DOES THE SEVENTH CIRCUIT'S DECISION CONFLICT WITH THIS COURT'S JURISPRUDENCE DEVELOPED IN *POWELL v. ALABAMA*, *STRICKLAND v. WASHINGTON*, *HILL v. LOCKHART* AND *MURRAY v. CARRIER*, AND DECISIONS OF OTHER FEDERAL COURTS OF APPEALS WHICH HAVE ADDRESSED THIS SPECIFIC ISSUE?

In affirming the district court's finding that Mroch's counsel was not ineffective during the pre-trial plea negotiations, the Seventh Circuit held that courts reviewing such a claim must look at the overall course of counsel's representation and found it "inappropriate to single out" counsel's performance pre-trial from his advocacy at trial in assessing the merits of such a claim. In effect, the Seventh Circuit held that, in order to successfully prosecute an ineffective assistance of counsel claim based upon deficient representation during pre-trial plea negotiations, a defendant must also establish his counsel performed deficiently at trial. The burden the Seventh Circuit placed on Mroch and future petitioners is constitutionally unreasonable in light of this Court's holdings

in a series of cases regarding the effectiveness of counsel during critical stages of the proceedings – including plea negotiations – and the availability of relief for defendants prejudicially affected by even an isolated, but sufficiently egregious, error committed during one of these critical stages. *See Murray v. Carrier*, 477 U.S. 478, 496 (1986).

In *Powell v. Alabama*, 287 U.S. 45, 57 (1932), this Court first held criminal defendants are entitled to the assistance of counsel during all critical stages of the proceedings and that the period between the arraignment through the beginning of trial can be "perhaps the most critical period of the proceedings."

Subsequently, this Court held a defendant is entitled to the ***effective*** assistance of counsel during all critical stages of the prosecution, *Strickland v. Washington*, 466 U.S. 668, 688 (1984), including pre-trial plea negotiations. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). In the context of asserting his trial counsel was ineffective during plea negotiations, this Court held a defendant must establish his counsel's performance was unreasonable or deficient and the defendant was prejudiced as a result of this unreasonable or deficient performance – namely, that the outcome of the plea process would have been different. *Hill*, at 59.

This Court has also held, in the context of assessing a defendant's ineffective assistance of counsel claim, that "the right to effective assistance of counsel . . . may in a particular case be violated by even an

isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, at 496 (*citing Strickland*, at 693-96).

This Court has never squarely addressed a reverse-*Hill* fact scenario – whether a defendant is entitled to relief when his trial counsel's deficient performance was the cause for the defendant's rejection of a favorable plea offer. Based upon the vast number of cases presenting that very factual scenario in lower courts, resolution of that recurrent issue presents an important question of federal law which should be settled by this Court, pursuant to Supreme Court Rule 10(c).

In holding that Mroch cannot establish his counsel was ineffective during pre-trial negotiations without also establishing counsel's trial advocacy was deficient, the Seventh Circuit has imposed a burden on Mroch and future defendants which is in conflict with this Court's holdings in *Powell*, *Strickland*, *Hill* and *Murray v. Carrier*, and has decided an important federal question in a way that conflicts with relevant decisions of this Court, also requiring review pursuant to Supreme Court Rule 10(c).

Finally, the Seventh Circuit's decision effectively creates a rule that a defendant cannot establish he was prejudiced for *Strickland/Hill* purposes and, correspondingly, obtain relief when his trial counsel was clearly ineffective during plea negotiations, if that same defendant received a fair trial (i.e., reasonable advocacy at trial). The Seventh Circuit's

decision, creating this rule, is in conflict with a number of other federal courts of appeals which have addressed this same important matter and requires this Court's review pursuant to Supreme Court Rule 10(a).

Specifically, in *U.S. v. Day*, 969 F.2d 39, 44 (3rd Cir. 1992), the Third Circuit explained why it rejected the same type of rule the Seventh Circuit effectively imposed in Mroch's case, citing a passage from an earlier circuit decision:

> The State argues that because [the defendant] received a fair trial he is not entitled to a habeas remedy even if he could prove ineffective assistance of counsel in the [plea negotiation stage of the proceedings]. This argument is untenable on the plea bargaining issue. Failure by defense counsel to communicate a plea offer to defendant deprives defendant of the opportunity to present a plea bargain for the consideration of the state judge and, on acceptance by the state judge, to enter a guilty plea in exchange for a lesser sentence. A subsequent fair trial does not remedy this deprivation.

(*Id.*), (*citing Caruso v. Zelinsky*, 689 F.2d 435, 438 (3rd Cir. 1982)). In support of that proposition the *Day* court noted a number of federal courts of appeals

cases[8] which had resolved the same question similarly and cited to:

> *U.S. v. Rodriguez-Rodriguez*, 929 F.2d 747, 753, n. 1 (1st Cir. 1991)
>
> *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981)
>
> *Turner v. Tennessee*, 858 F.2d 1201, 1205-07 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1992), *reinstated*, 726 F. Supp. 1113 (1989), *affirmed*, 940 F.2d 1000 (1991)
>
> *Johnson v. Duckworth*, 793 F.2d 898, 902 (7th Cir. 1986).

Since the *Day* decision other circuits have taken up the same issue and reached similar conclusions. *U.S. v. Engelen*, 68 F.3d 238, 241 (8th Cir. 1995); *Nunes v. Mueller*, 350 F.3d 1045, 1052-53 (9th Cir. 2003) and *Diaz v. U.S.*, 930 F.2d 832, 835 (11th Cir. 1992).

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[8] The *Day* court also noted a number of state courts reaching the issue had also found a defendant seeking habeas relief for ineffective assistance of trial counsel during the plea negotiation stage of proceedings could establish prejudice and, thus, obtain relief from a conviction, even if that defendant received a fair trial. *Day*, at 44-45, n. 7. The court cited supporting cases in the states of California, Georgia, Illinois, Indiana, New York, Nevada, North Carolina, Pennsylvania, Texas, Washington and West Virginia. Since the *Day* decision, the Wisconsin Court of Appeals reached a similar conclusion and found a fair trial does not preclude a successful claim of ineffective counsel during the plea process. *State of Wisconsin v. Fritz*, 212 Wis.2d 284, 369 N.W.2d 48 (Ct. App. 1997).

In concluding a defendant whose trial counsel unreasonably deprived him of a favorable plea offer is entitled to habeas relief from his conviction, despite a subsequent fair trial, the *Nunes* court also reasoned that counsel's deficiency deprived the defendant of his rights to make an informed decision regarding his plea and to participate in deciding "his own fate." *Nunes*, at 1052-53 (*citing Hill v. Lockhart*, at 57; *Jones v. Barnes*, 463 U.S. 745, 751 (1983)).

II. IN FINDING MROCH'S COUNSEL PERFORMED REASONABLY BY MERELY CONVEYING THE GENERAL TERMS OF THE GOVERNMENT'S PLEA OFFER, IS THE SEVENTH CIRCUIT'S DECISION IN CONFLICT WITH OTHER FEDERAL COURTS OF APPEALS WHICH REQUIRE REASONABLY COMPETENT COUNSEL TO FULLY AND ADEQUATELY EXPLAIN THE DIFFERENCE BETWEEN THE GUIDELINES SENTENCES THE DEFENDANT LIKELY FACES IN ACCEPTING THE OFFER *VERSUS* SENTENCING AFTER A CONVICTION AT TRIAL?

Mroch did not claim his trial counsel completely failed to convey a plea offer, which is almost certainly unreasonable. *Cullen v. U.S.*, 194 F.3d 401, 404 (2nd Cir. 1999); *Satterlee v. Wolfenberger*, 453 F.3d 362 (6th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S.Ct. 1832 (2007); *Johnson v. Duckworth*, at 902. He did, however, allege Barth in failing to provide the specifics

regarding the charges to which the government required Mroch to plead as part of the offer or the specific guidelines range the government contemplated would apply should Mroch accept the plea deal, effectively did little more than "tell" Mroch about the offer. Thus, he alleged Barth did not fully or accurately convey the government's offer.

A number of federal courts of appeals addressing competent trial counsel's responsibilities in the context of plea negotiations have found that, at the very least, counsel must convey the specific terms of the plea offer – including the offenses to which the defendant must admit and the specific contemplated sentencing range. *Cullen*, at 403-04; *U.S. v. Herrera*, 412 F.3d 577, 579 (5th Cir. 2005); *Wanatee v. Ault*, 259 F.3d 700, 704 (8th Cir. 2001); *Day*, at 43.

In finding that Barth's representation was reasonably competent in merely providing Mroch with the general terms of the plea offer, without fully explaining the specific offenses he would be required to admit and the specific guidelines range contemplated in the plea offer, versus proceeding to trial, the district court and the Seventh Circuit decisions are in conflict with those courts requiring more than just a "general" explanation of the offer in order to satisfy counsel's constitutional obligation to his client and requires this Court's review pursuant to Supreme Court Rule 10(a).

A number of federal courts of appeals have required more than just counsel's full and accurate

explanation of the government's plea offer to his client. Reasonably competent counsel should also explain to his client the possible sentencing differentials between accepting the government's offer, versus sentencing after trial. *Cullen*, at 403-04; *Herrera*, at 579; *Wanatee*, at 704; *Nunes v. Mueller*, at 1053. Recognizing the importance the United States Sentencing Guidelines play in the outcome of federal criminal prosecutions, federal appellate courts have also found that competent counsel must undertake an evaluation of the applicable guidelines ranges in resolving the case *via* a plea offer from the government, versus proceeding to trial, and share that information with the defendant as part of a discussion on how best to proceed.[9] *Smith v. U.S.*, 348 F.3d 545, 549 (6th Cir. 2003) (*citing Day*, at 43).

The Second, Third, Fifth, Sixth, Eighth and Ninth Circuits have all required far more from reasonably competent counsel than the Seventh Circuit in Mroch's case. In finding Barth met his obligation to Mroch during the plea negotiation process without

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[9] Petitioner recognizes the guidelines are now only advisory. *U.S. v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005). However, they were mandatory at the time of Mroch's sentencing and it is likely many habeas petitioners with claims similar to Mroch are serving sentences imposed pre-*Booker*. Additionally, the guidelines do remain a factor the sentencing court must consider, pursuant to 18 U.S.C. §3553(a). *See Gall v. U.S.*, ___ U.S. ___, 128 S.Ct. 586, 596 (2007). Thus, a working knowledge of the guidelines and the need to convey that information to defendants considering plea offers remains.

discussing the guidelines implications, especially regarding how the relevant conduct guidelines interrelate with federal conspiracy law, the Seventh Circuit's ruling is grossly inconsistent with its sister circuits and the conflict is one that this Court should address pursuant to Supreme Court Rule 10(a).

III. IN FINDING MROCH'S SWORN STATEMENTS WERE INSUFFICIENT "OBJECTIVE EVIDENCE" THAT MROCH WOULD HAVE ACCEPTED THE GOVERNMENT'S PLEA OFFER HAD COUNSEL PERFORMED REASONABLY, IS THE SEVENTH CIRCUIT'S DECISION IN CONFLICT WITH OTHER FEDERAL COURTS OF APPEALS WHICH HAVE ALSO CONSIDERED THE DIFFERENCE BETWEEN THE SENTENCE OFFERED AND THE SENTENCE IMPOSED AFTER TRIAL IN ASSESSING THE *STRICKLAND* PREJUDICE PRONG?

In *Toro v. Fairman*, the Seventh Circuit held that a defendant asserting his trial counsel's deficient performance during the plea process which resulted in him foregoing a favorable plea offer, must "establish through objective evidence that there is a reasonable probability that, but for counsel's advice, he would have accepted the plea." *Toro*, at 1068.[10] One

[10] It is relevant that a judge of the Seventh Circuit has questioned the wisdom of the "objective evidence" requirement.
(Continued on following page)

other federal circuit addressing a similar claim found the Seventh Circuit's requirement of "objective evidence" an unnecessary burden on the habeas petitioner. *Magana v. Hofbauer*, 263 F.3d 132, 142, n. 1 (6th Cir. 2001) (*Strickland* requires only that a defendant demonstrate there is a "reasonable probability" the result of the proceeding would have been different and the Supreme Court has never required a defendant meet this burden of proof through objective evidence). The conflict between the Sixth and Seventh Circuits alone could serve as the basis for this Court's review on whether the defendant must offer "objective evidence" in support of his claim. Supreme Court Rule 10(a).

Other circuits have adopted the "objective evidence" test in the context of an ineffective assistance of plea counsel claim. *U.S. v. Gordon*, 156 F.3d 376, 381 (2nd Cir. 1998); *Herrera*, at 579; *Wanatee*, at 704; *Diaz*, at 835. In this respect, the Fifth Circuit held that, in addition to the defendant's claim he would have accepted the offer had counsel performed reasonably, any increased sentence resulting from the rejected plea offer was the type of "objective evidence"

Concurring in a case subsequent to *Toro* and dealing with a factually-similar ineffective claim, Judge Rovner asserted she is "at a loss to understand why the prejudice component for this type of claim – ineffective assistance of counsel in the context of a proposed plea – should be treated any differently than the prejudice component for any other type of ineffectiveness claim." *Paters v. U.S.*, 159 F.3d 1043, 1049 (7th Cir. 1998) (Rovner, concurring).

the court would consider sufficient to establish prejudice. *Herrera,* at 580. The Second Circuit has held the reviewing court may consider the sentence the government offered pre-trial, versus that imposed following trial, in determining whether the defendant presented sufficient "objective evidence" to establish he would have accepted that offer. *Gordon*, at 381 and *Cullen*, at 407-08.

Mroch offered his affidavit and other sworn pleadings claiming he would have accepted the government's pre-trial offer had counsel given him accurate and complete information regarding the offer; had he known what sentence was likely in accepting the government's offer, versus proceeding to trial; had he understood the application of the sentencing guidelines to his case and how the relevant conduct provisions of the guidelines interrelated with federal conspiracy law to affect his likely sentence. Additionally, he presented evidence that the government's pre-trial offer contemplated a sentencing guidelines range of 70 to 87 months, which was substantially less than the 288-month sentence imposed after he rejected the offer and was convicted at trial. In denying Mroch's claim without conducting an evidentiary hearing, the lower courts completely discounted Mroch's sworn statements and, more importantly, failed to consider the substantial difference in the length of sentence offered Mroch pre-trial, versus imposed after his conviction at trial. In finding that Mroch offered no "objective evidence" he would have accepted the government's offer, the Seventh Circuit's decision is in

conflict with other federal circuits and requires this Court review the issue pursuant to Supreme Court Rule 10(a).

IV. IN FINDING MROCH'S CONCERN FOR ACCEPTING A PLEA OFFER REQUIRING HIS ADMISSION TO MORE COCAINE THAN HE "HONESTLY" POSSESSED WAS A CLAIM OF INNOCENCE AND PRECLUDED HIM, AS A MATTER OF LAW, FROM ESTABLISHING HE WAS PREJUDICED BY HIS COUNSEL'S UNREASONABLE PERFORMANCE, IS THE SEVENTH CIRCUIT'S DECISION IN CONFLICT WITH OTHER FEDERAL COURTS OF APPEALS WHICH HAVE DETERMINED A CLAIM OF INNOCENCE IS MERELY A FACTOR TO CONSIDER IN ASSESSING THE *STRICKLAND* PREJUDICE PRONG?

In their decisions denying Mroch's ineffective assistance claim, the lower courts found Mroch's assertion he was concerned the government's offer required him to admit to more cocaine than he "honestly" possessed constituted his claim of innocence and established he would not have pleaded guilty even if his counsel reasonably conveyed and explained the government's offer and attendant sentencing implications. The courts unreasonably drew this conclusion without the benefit of a hearing at which further facts could have been elicited to determine whether this was truly a claim of innocence or

demonstrated how little trial counsel did to educate his client about the relationship between federal conspiracy law and the relevant conduct provisions of the sentencing guidelines. *See Hoffman v. Arave*, 544 F.3d 926, 938 (9th Cir. 2006) (defendant's reliance on a misunderstanding of aider and abettor liability in rejecting the government's plea offer did not constitute a claim of innocence or principled stand against acceptance of the offer).

Even if the lower courts were justified in treating Mroch's uneducated and apparently un-counseled concerns as a claim of innocence, the courts' finding such a claim precluded Mroch, as a matter of law, from establishing he would have accepted the plea offer had his counsel performed reasonably is in conflict with at least two other federal circuits to address the same issue.

In *Cullen,* the Second Circuit held a criminal defendant's sustained claims of innocence pre-trial, during his testimony at trial and at the post-conviction evidentiary hearing on his §2255 claim was not dispositive, but merely a factor the court could consider in determining whether the defendant would have accepted the offer had he been properly counseled. *Cullen*, at 407. The court reasoned that a defendant properly advised of the difference in possible sentences he faced in accepting the government's offer, versus after his conviction at trial, might well abandon his prior claims of innocence and accept the offer. (*Id.*). The Sixth Circuit reached a similar conclusion and found a defendant's protestations of

innocence did not preclude finding that same defendant credible when he claimed he would have accepted the government's favorable offer, if reasonably counseled. *Smith v. U.S.*, at 549 (*citing North Carolina v. Alford*, 400 U.S. 25, 33 (1970), for proposition that a defendant may enter a guilty plea while maintaining his innocence and "reasons other than the fact that he is guilty may induce a defendant to so plead . . . and he must be permitted to judge for himself in this respect").

In finding Mroch was precluded from establishing prejudice for his counsel's failure to perform competently in conveying and fully explaining the government's plea offer, because Mroch purportedly proclaimed his innocence, the Seventh Circuit's decision is in conflict with two other federal circuits addressing this same important question and this Court's review is necessary pursuant to Supreme Court Rule 10(a).

CONCLUSION

This Court should grant the petition for writ of certiorari, reverse the judgment of the Seventh Circuit, and remand for further proceedings.

Respectfully submitted,

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NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with

Fed. R. App. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 2, 2008*
Decided May 8, 2008

Before

FRANK H. EASTERBROOK, *Chief Judge*

DANIEL A. MANION, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

No. 07-3734

RICHARD E. MROCH,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 04 C 470
J.P. Stadmueller, *Judge*

* This successive appeal has been submitted to the original panel under Operating Procedure 6(b). After examining the briefs and the record, we have concluded that oral argument is unnecessary. *See* Fed. R. App. P. 34(a); Cir. R. 34(f).

Order

Richard Mroch, who was convicted of racketeering after a lengthy trial, *see United States v. Warneke*, 310 F.3d 542 (7th Cir. 2002), contends in this collateral attack under 28 U.S.C. §2255 that his lawyer furnished ineffective assistance by recommending that he decline the offer of a plea bargain which, had it been accepted, would have led to a sentence lower than the one that followed the trial. Mroch maintains that his lawyer should have advised him that his chances of acquittal were low and that the proffered deal was a good bargain. He thus contends that he is entitled not only to a chance at complete acquittal but also to the lower sentence that was offered before trial in exchange for surrendering that right.

The district court denied this motion in a comprehensive opinion. We affirm on the basis of that opinion, with one additional observation. Whether counsel furnished ineffective assistance depends on the overall course of representation; it is inappropriate to single out one aspect of a lawyer's work while ignoring the rest. Mroch's lawyer worked hard to produce an outright acquittal, and his new lawyer does not fault his old lawyer's performance as an advocate. It is inappropriate to divorce the advice to go to trial from an analysis of what could be (and indeed was) done *at* trial on a client's behalf. *See also, e.g., Almonacid v.*

United States, 476 F.3d 518 (7th Cir. 2007); *Toro v. Fairman*, 940 F.2d 1065 (7th Cir. 1991).

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RICHARD E. MROCH,

Petitioner,

v. Case No. 04-CV-470

UNITED STATES OF AMERICA,

Respondent.

ORDER

On May 17, 2004, Richard E. Mroch ("Mroch") filed a petition under 28 U.S.C. § 2255 to vacate, set-aside, or correct the federal sentence he currently is serving. This matter has been fully briefed and is now ready for decision. For the reasons set forth below, Mroch's petition will be denied.

BACKGROUND

On November 11, 1998, a grand jury sitting in this district returned a superseding indictment charging Mroch, along with 16 other co-defendants, with Racketeer Influenced and Corrupt Organizations ("RICO") offenses, RICO conspiracy offenses, and drug conspiracy offenses. (*See United States v. O'Neill et al.*, Case. No. 97-CR-98, November 11, 1998 Superseding Indictment, Docket # 793.) Specifically, Mroch was charged at counts one through three with violations of 18 U.S.C. §§ 1962(c) and (d), 21 U.S.C.

§§ 841(a)(1), 846, and 18 U.S.C. § 2. Mroch pled not guilty to each of these offenses, and after several rounds of pretrial motions, he proceeded to trial. On June 15, 2006, Mroch was found guilty of all counts. He was sentenced to two concurrent terms of 240 months' imprisonment to run consecutive to a term of 48 months' imprisonment for a total sentence of 288 months. Mroch appealed to the Seventh Circuit Court of Appeals, which affirmed the convictions and sentence. *United States v. Warneke,* 310 F.3d 542 (7th Cir. 2002). He then petitioned for rehearing en banc and for writ of certiorari to the Supreme Court, both of which were denied.

Mroch's section 2255 petition sets forth a single ground where he alleges ineffective assistance of counsel. In his petition he requests an evidentiary hearing and an order of the court vacating his conviction and sentence. Additionally, on July 8, 2004, Mroch filed an amendment to his petition, adding a claim that his sentence was imposed in violation of his Sixth Amendment rights, pursuant to the holdings of *Blakely v. Washington,* 542 U.S. 738 (2004). The government filed a detailed response to his petition on January 6, 2006, and recommended that his petition be denied without a hearing.

ANALYSIS

Section 2255 provides that a prisoner "may move the court which imposed the sentence to vacate, set aside, or correct the sentence" on the ground that his

sentence was imposed in violation of the Constitution or the laws of the United States. To receive relief under section 2255, a petitioner must demonstrate a "fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Addonizio,* 442 U.S. 178, 185 (1979). The Seventh Circuit has also articulated that the substance of the petition takes precedence over its form, and petitions that arise under section 2255 are properly treated as such. *Guyton v. United States,* 453 F.3d 425 (7th Cir. 2006). Mroch's petition clearly alleges that his sentence was imposed in violation of his Sixth Amendment rights, and the court notes at the outset it falls classically within the purview of section 2255 petitions.

I. Ineffective Assistance of Counsel

Mroch alleges his attorney was ineffective during the plea negotiations because he failed to adequately discuss the impact the sentencing guidelines would have on Mroch, should he reject the plea offer and proceed to trial. In support of his petition and claim that he was deprived the effective assistance of counsel, Mroch submitted a brief along with affidavits from himself, his mother, Carole Mroch; Charles Lahey ("Lahey"), a law enforcement official; and his trial attorney, Michael Barth ("Barth").

To establish that he was deprived of his right to effective counsel, Mroch must show (1) that his counsel's representation fell below an objective standard of

reasonableness, and (2) that he was prejudiced because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. 668, 695 (1984). It is well-settled that the *Strickland* test applies to the plea process. *Hill v. Lockhart,* 474 U.S. 52, 57 (1985). In the context of plea negotiations, the Seventh Circuit has held that to meet the "prejudice" prong of *Strickland,* a defendant must establish through objective evidence that there is a reasonable probability that, but for counsel's advice, he would have accepted the plea offer. *Toro v. Fairman,* 940 F.2d 1065, 1068 (7th Cir. 1991).

Mroch asserts, through his brief and affidavit, that Barth received a plea offer from the government, whereby the parties agreed to seek a term of imprisonment of 70-87 months (Mroch's Pet. 6). At attachment 1 of Mroch's petition, he submits a copy of the actual May 14, 1999 plea offer tendered by the government which details that the government would allow Mroch to plead guilty to an information charging him with one count of racketeering in violation of 18 U.S.C. § 1959, and one count of conspiracy to distribute controlled substances in violation of 21 U.S.C. § 841. (Mroch's Pet. Attach. 1). At the time the offer was made, Mroch believed that it had been orally communicated to Barth by the government. He also stated that he did not receive a letter or any further details about this agreement until after his case was concluded. (*Id.*)

However, Mroch fully acknowledges that he was informed of this offer, and his statements, both in his brief and affidavit, also evidence that he was given specific information regarding the length of the potential sentence under the terms of the agreement and the offense he would plead guilty to. His statements further suggest that aside from discussing it with Barth, he discussed the offer with other individuals, specifically his mother and Lahey. Nevertheless, Mroch claims Barth's conduct fell below an objective standard of reasonableness because he didn't adequately explain the potential sentence Mroch faced if he rejected the plea and proceeded to trial.

This circuit has continually held that in a criminal case, "defense attorneys have a duty to inform their clients of plea agreements proffered by the prosecution, and failure to do so constitutes ineffective assistance of counsel under the sixth and fourteenth amendments." *United States v. Golden,* 102 F.3d 936, 943 (7th Cir. 1996) (quoting *Johnson v. Duckworth,* 793 F.2d 898, 902 (7th Cir. 1986)). Mroch makes much hubbub about the fact that the government actually tendered the plea offer in writing to Barth, rather than orally, but this is irrelevant. So long as Barth communicated the essential terms of the agreement to Mroch, he has satisfied the Sixth Amendment right to counsel standards in the context of plea negotiations. *See Golden,* 102 F.3d 936, 943 (holding that "criminal defense attorneys have a duty to inform their clients of plea agreements proffered by

the prosecution, and that failure to do so constitutes ineffective assistance of counsel"). Mroch, his mother, and law enforcement agents all aver that Mroch was very much aware of the 6 to 6½ years sentence the government referred to in the plea offer. (Mroch Pet. 5, Attachs. 2-6.) Therefore, Barth has met this standard of effective counsel as defined by the Seventh Circuit; he assuredly communicated the prosecution's plea agreement to Mroch, and even went into some detail about the terms of the agreement.

Furthermore, it appears that Barth met the objectively reasonable standard of conduct in other aspects of his plea consultation with Mroch; specifically, his advice that Mroch reject the plea offer. He informed Mroch that based on his experience as a trial attorney and his review of the evidence, he could defend his client and secure an acquittal. (Mroch Pet. 5-6; *see also* Barth Aff. ¶ 5). The *Strickland* standard affords attorneys a wide range of "reasonableness," and Barth's assessment should be given such deference. In fact, the *Strickland* burden is a high standard to meet; the defendant must allege "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687. It appears, both through Barth's statements and even Mroch's, that his assessment was based on a professional, thoughtful review of the evidence in this case. This advice is also distinguishable from the attorney's conduct in the *Toro* case Mroch cites. In *Toro,* the defendant's attorney urged his client to reject a plea

for a 6 year sentence offered by the government, and when Toro was found guilty at trial, he received a 20 year term of imprisonment. *Toro,* 940 F.2d at 1066. Toro's attorney conceded that his advice for his client to reject the plea was based more upon an emotional desire for his client to not go to prison, rather than a professional and rational judgment based upon the law and the facts of the case. *Id.* at 1068. Here, the Seventh Circuit held that this conduct was indeed below the *Strickland* standard of objectively reasonable. *Id.* This situation is different because Barth drew on his past experience as an attorney which, combined with his review of the evidence, supported his conclusion that he could effectively defend his client; his judgment was both professional and rational, as well as reasonable.

Even assuming *arguendo* that Barth's conduct fell below an objective standard of reasonableness, Mroch is unable to meet the second prong of *Strickland,* that he was prejudiced. As stated above, he must be able to establish, through objective evidence, that there is a reasonable probability that but for his counsel's advice, he would have accepted the plea offer. *Toro,* 940 F.2d at 1068; *see also Pater v. United States,* 159 F.3d 1043, 1047 (7th Cir. 1998). After a review of the affidavits submitted by Mroch, the court finds that he has not set forth objective evidence to sustain his burden.

Most significantly, the affidavit Mroch submitted from Lahey, a law enforcement agent, in which Lahey states he recalled a conversation with Mroch where

he learned that Mroch was offered a plea bargain by the government but he "declined the plea due to the fact that the change [sic] would require him to plead to possessing large quantities of cocaine which he did not 'honestly' possess." (Lahey Aff. ¶ 2). This statement completely undercuts any of the self-serving statements Mroch provided stating that but for the conduct of his attorney, he would have accepted the guilty plea. Lahey's affidavit demonstrates that Mroch both knew of and understood the relevant terms of the plea agreement, yet he chose not to accept it on the terms the government provided.

The affidavit of Carole Mroch, Mroch's mother, conveys similar information undercutting any possibility that Mroch would have accepted the plea agreement. Carole Mroch states that she too was aware of the plea offer the government tendered and that she thought Mroch should have accepted the offer. Carole Mroch further states that she had multiple conversations with Barth about Mroch's case, and urged her son to accept the plea agreement the government offered. Carole Mroch also averred that her son declined to follow her advice based upon the representations his attorney made.

Additionally, Mroch's own affidavit and filings do not establish the necessary showing of prejudice. First, Mroch admits to knowing that he faced a lifetime term of imprisonment if he proceeded to trial and was found guilty. Despite this knowledge, Mroch states he simply assumed he would only face a maximum penalty of 10 years, and he cites to celebrity

criminal cases for support as to why he believed he would receive a substantially lower sentence. (Mroch's Pet. 12.) However, Mroch's misunderstanding of reality based upon news reports does not implicate that Barth's representation was unreasonable. His affidavit also states that he was skeptical of accepting a plea agreement to the terms communicated to him by Barth, because of the large drug quantities the government required him to plead to. (Mroch's Aff. ¶ 7.) Even Mroch's statements that the rejection was based upon the advice of his attorney that he could competently defend Mroch at trial do not show that Mroch was prejudiced; the *Strickland* standard forbids a court from second-guessing an attorney's professionally reasonable advice in light of hindsight. *See Johnson v. United States,* 838 F.2d 201, 206-07 (7th Cir. 1998) (stating that when reviewing an attorney's tactical decisions, "*Strickland* explicitly forbids" a court to "second-guess counsel's assistance").

Accordingly, after a review of the briefs and affidavits in the record, the court does not find that Mroch has produced the necessary objective evidence establishing that he was prejudiced as a result of his attorney's representation. To the contrary, the record discloses that Barth communicated a plea agreement, and after a knowing consultation with his client based upon his professional advice, Mroch rejected the plea agreement and exercised his right to proceed to trial.

II. Mroch's Request for an Evidentiary Hearing

Mroch cites to *United States ex rel. Simmons v. Bramley,* 915 F.2d 1128 (7th Cir. 1990) and requests an evidentiary hearing on his petition. (Mroch's Pet. 14.) A court may dismiss a 2255 petition without holding an evidentiary hearing if on the face of the record it appears the petitioner is not entitled to any relief. *Dagan v. United States,* 18 F.3d 460, 464 (7th Cir. 1994) (citing *Aleman v. United States,* 878 F.2d 1009, 1012 (7th Cir. 1989)). In accordance with the court's analysis above, it finds that on the face of the record that Mroch is not entitled to any relief because he has not satisfied either prong of the *Strickland* test to demonstrate ineffective assistance of counsel.

III. *Blakely* Challenges

On July 8, 2004, Mroch filed a supplemental motion amending his section 2255 petition. In this circuit, *Blakely* and its progeny, *United States v. Booker,* 543 U.S. 220 (2005), do not retroactively apply to sentences that became final before January 12, 2005. The Seventh Circuit recently made this clear in *McReynolds v. United States,* 397 F.3d 479 (7th Cir. 2005):

> *Booker* does not apply to criminal cases that became final before its release on January 12, 2005. That date, rather than June 24, 2004, on which *Blakely v. Washington,* 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), came down, is the appropriate dividing line;

> *Blakely* reserved decision about the status of the federal Sentencing Guidelines, *see id.* at 2538 n.9, so *Booker* itself represents the establishment of a new rule about the federal system.

Id. at 481.

Here, the court is able to conclusively determine that Mroch is entitled to no such relief because his sentence became final well before January 12, 2005. As such, *Blakely* and *Booker* cannot constitute a ground for collateral attack under § 2255.

Accordingly,

IT IS ORDERED that Richard Mroch's petition under 28 U.S.C. § 2255 be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that Richard Mroch's request for an evidentiary hearing be and the same is hereby **DENIED**; and

IT IS FURTHER ORDERED that this action be and the same is hereby **DISMISSED** with prejudice.

The clerk is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 11th day of July, 2007.

BY THE COURT:

s/ J. P. Stadtmueller
J. P. Stadtmueller
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RICHARD E. MROCH

v.

UNITED STATES OF AMERICA

JUDGMENT IN A CIVIL CASE

Case Number: 04-CV-470

Decision by Court. This action came on for consideration before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Richard E. Mroch's petition under 18 U.S.C. §2255 be and the same is hereby DENIED; and

IT IS FURTHER ORDERED AND ADJUDGED that this action be and the same is hereby DISMISSED with prejudice.

APPROVED: s/ J. P. Stadtmueller
U.S. District Judge

July 11, 2007
Date

JON W. SANFILIPPO
Clerk

s/ Patricia K. Blackburn
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RICHARD MROCH,

Petitioner,

v.

Case No. 04-CV-470

UNITED STATES
OF AMERICA,

Respondent.

ORDER

On July 11, 2007, this court issued a decision and order denying Richard Mroch's petition under 28 U.S.C. § 2255 and dismissing the action. Thereafter, on August 24, 2007, Mroch filed a notice of appeal, and on August 27, 2007, Mroch filed a request for a certificate of appealability ("COA"). For the reasons set forth below, the court will grant Mroch's request for a COA.

Pursuant to 28 U.S.C. § 2253(c), a district court must consider whether to grant a certificate of appealability. The statute provides that an appeal may not be taken unless a "circuit justice or judge" grants a certificate of appealability, and Rule 22 of the Federal Rules of Appellate Procedure provides that "[i]f an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue." Fed. R. App. P. 22(b)(1).

A prisoner seeking a COA must demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003), rev'd on other grounds, *Miller-El v. Dretke,* 545 U.S. 231 (2005).

Mroch's underlying petition set forth two grounds he argued entitled him to relief. First, he argued that he suffered ineffective assistance of counsel in violation of his Sixth Amendment rights, and second, he argued that the Supreme Court's holding in *United States v. Booker,* 543 U.S. 220, (2005), entitled him to a lower sentence. Mroch now wishes to appeal the court's adjudication of his Sixth Amendment ineffective assistance of counsel claim.

Mroch's Sixth Amendment claim argued that his trial attorney, Michael Barth, failed to competently represent him during the plea negotiation stages of his case. Specifically, he argued that Barth failed to adequately inform him of the penalties and sentencing implications he would face if he elected to go to trial and was found guilty. The court cited relevant Seventh Circuit law on this point, noting that attorneys have obligations to communicate all plea offers to their clients. *See United States v. Golden,* 102 F.3d 936, 943 (7th Cir. 1996). From the record, it appeared that Barth had adequately informed Mroch of the

government's plea offer, and that he further provided him with detailed information regarding the terms of the offer and the statutes and counts Mroch would plead guilty to under its terms. Mroch also attached an affidavit from Barth, who indicated that he advised Mroch that he believed that he would be able to defend his case. The court further discussed the Seventh Circuit's holding in *Toro v. Fairman,* 159 F.3d 1043 (7th Cir. 1998), which stated that in considering an ineffective assistance of counsel claim under these circumstances, the court should consider whether the petitioner established: "(1) through objective evidence that (2) there is a reasonable probability that he would have accepted the alleged proposed plea agreement absent defense counsel's advice." *Toro,* 940 F.2d at 1068. Further, the *Toro* court noted that the focus is "exclusively on the objective evidence standard and disregard[s] the degree of disparity between the six-year proposed plea agreement and twenty-year actual sentence." *Paters v. United States,* 159 F.3d 1043, 1046 (7th Cir. 1998) (citing *Toro,* 940 F.2d at 1066)).

In relation to Mroch's claims, the court noted that he was unable to establish, through objective evidence, that he would have accepted the plea agreement. This was because each of the affidavits he submitted, including his own, noted that he was dissatisfied with significant and relevant portions of the agreement, including that he would have to plead guilty to drug counts he believed he did not commit. Therefore, the objective evidence indicated that while

Mroch understood the terms of the plea agreement, all of the objective evidence indicated that he would not have accepted the plea agreement under its provisions. Accordingly, the court denied the claim as he was unable to establish either of the *Strickland* prongs as described through *Toro* or *Paters*.

Moreover, the court believed that his inability to establish ineffective assistance of counsel was conclusive on the record, and a hearing was unnecessary. If "the record conclusively demonstrates that the defendant is entitled to no relief," then the court is not required to hold an evidentiary hearing on the petitioner's claims. *McCleese v. United States,* 75 F.3d 1174, 1182 (7th Cir. 1996) (citing *Dugan v. United States,* 18 F.3d 460 (7th Cir. 1994)).

However, despite the court's finding and conclusion that Mroch was not entitled to relief and that his petition was without merit, this is an important question, and one that jurists of reason could possibly debate. *See Miller-El,* 537 U.S. at 327. Therefore, the court is obliged to grant Mroch's request for a COA.

Accordingly,

IT IS ORDERED that Richard Mroch's request for certificate of appealibility [Docket # 14] be and the same is hereby **GRANTED**.

Dated at Milwaukee, Wisconsin on November 9, 2007.

BY THE COURT:

/s/ J.P. Stadtmueller
J.P. Stadtmueller
U.S. District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 7, 2008

Before

FRANK H. EASTERBROOK, *Chief Judge*

DANIEL A. MANION, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

RICHARD E. MROCH, *Petitioner-Appellant*, **No.** 07-3734 **v.** UNITED STATES OF AMERICA, *Respondent-Appellee.*	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 04 C 470 J.P. Stadmueller, *Judge.*

Order

Petitioner-appellant filed a petition for rehearing and rehearing en banc on June 23, 2008. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.